No. 77-977

In the Supreme Court of the United States

OCTOBER TERM, 1977

HUBBARD BROADCASTING, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The judgment of the court of appeals (Pet. App. 114-115) is not reported. The report and order of the Federal Communications Commission (Pet. App. 82-113) is reported at 59 F.C.C. 2d 32.

JURISDICTION

The judgment of the court of appeals was entered on September 22, 1977. The petition for a writ of certiorari was filed on January 6, 1978, in conformity with an enlargement of time granted by the Chief Justice. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 307(b) of the Communications Act, as amended, 49 Stat. 1475, 47 U.S.C. 307(b), is reproduced in Petitioner's Appendix, p.1.

QUESTION PRESENTED

Whether the Federal Communications Commission properly selected WABC over KOB as the primary occupant of clear-channel frequency 770 KHz.

STATEMENT

Petitioner, Hubbard Broadcasting, Inc., is the licensee of radio station KOB in Albuquerque, New Mexico. Since October 1941, KOB has shared the frequency 770 KHz with WABC in New York City, a station licensed to American Broadcasting Companies, Inc. (ABC). The Commission in 1958 amended its rules to permit both stations to operate as full time, maximum power (50 kw) stations, each station being required to protect the other's nighttime signal by the use of directional antennae. *Albuquerque Broadcasting Co. (KOB)*, 25 F.C.C. 683. The effect of this decision, which has never been fully implemented,[1] would have been to enlarge the KOB nighttime service area and to reduce WABC's service area.

WABC, which had previously operated on 770 KHz without a directionalized antenna in keeping with its status as a Class I-A clear channel station,[2] sought judicial

[1]WABC has never used a directionalized antenna.

[2]A clear channel is a frequency specified by the Commission for use by stations which render service over a wide area. 47 C.F.R. 73.21(a). A Class I station is a dominant station operating on a clear channel essentially free from objectionable interference. On some clear channels only one Class I station is permitted to operate; these stations are Class I-A stations. On other clear channels more than one Class I station is permitted, and they must protect each other's signal by using directional antennae; these are Class I-B stations. Class II stations are secondary stations which also operate on clear channels, but must protect Class I stations from interference caused by their operation and are subject to interference from Class I stations. There are three types of Class II stations.

The frequency 770 KHz is one of twenty-five clear channel frequencies on which Class I-A stations are authorized and one of fourteen clear channels on which an unlimited time Class II station may be assigned.

review of the 1958 decision. The court of appeals affirmed, but with reservations. *American Broadcasting—Paramount Theatres, Inc.* v. *Federal Communications Commission*, 280 F. 2d 631 (C.A.D.C.). Noting that the New York City AM radio stations owned by the NBC and CBS networks, WNBC and WCBS, were authorized as Class I-A stations, the court stated its understanding that the Commission would thereafter seek to provide ABC with an AM station facility comparatively equal to those of the CBS and NBC networks. *Id.* at 635-636.

The Commission then began a proceeding concerning the effect of the 1958 decision on ABC's competitive position with respect to the CBS and NBC networks. While this was in progress, the Commission completed its long-standing clear channel rulemaking proceedings, which left intact the status of WCBS and WNBC as Class I-A stations. 31 F.C.C. 565 (1961), affirmed as *Goodwill Stations, Inc.* v. *Federal Communications Commission*, 325 F. 2d 637 (C.A.D.C.).[3] In 1963, the Commission

[3]*Clear Channel Broadcasting*, 31 F.C.C. 565 (1961). The clear channel rules culminated a sixteen year proceeding in which the Commission determined that "breaking down" Class I-A clear channels to permit multiple Class I-B stations on them generally would not result in a better distribution of radio service for the country. A specific proposal of reclassifying all three New York City network stations to Class I-B and authorizing additional Class I-B stations in the West on those frequencies was rejected on the ground it would not result in better radio service to the public. *See* Further

reaffirmed its 1958 decision which had called for both WABC and KOB to be classified I-B stations after determining that WABC's I-B status would not place it at a competitive disadvantage with respect to WCBS and WNBC. *Hubbard Broadcasting, Inc., et al.*, 35 F.C.C. 36.

ABC again sought judicial review, and the court of appeals reversed. *American Broadcasting-Paramount Theatres, Inc.* v. *Federal Communications Commission*, 345 F. 2d 954 (C.A.D.C.). The court held that the Commission had failed to justify its provision to ABC of channel facilities inferior to those of CBS and NBC. *Id.* at 959-960. It stated that the Commission would have to find compelling public interest reasons not yet advanced before it could justify any result which did not authorize facilities for WABC equal to those of WCBS and WNBC. *Id.* at 960.

The Commission sought review in this Court, arguing that the Commission should not be required to ensure comparatively equal radio network facilities, nor make that the touchstone of its decision in this case. The petition for certiorari was denied. *United States, et al.* v. *American Broadcasting-Paramount Theatres, Inc.*, 383 U.S. 906.

On remand the Commission found that new radio services had been authorized in New Mexico since the court of appeals decision in 1965 (Pet. App. 102-104). Although this redressed "part of the allocations imbalance" on which the Commission based its earlier

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Notice of Proposed Rulemaking in Docket No. 6741, 23 Fed. Reg. 2612, 2617 and Third Notice of Further Proposed Rulemaking, 24 Fed. Reg. 7737. Instead, the Commission authorized Class II-A stations on some Class I-A channels as the best method of increasing radio service to the public in its clear channel order.

decision to award KOB Class I-B status, the Commission reiterated its earlier-expressed view that so far as the needs of the Southwest were concerned, there was "considerable merit" in making both KOB and WABC Class I-B operations (Pet. App. 108, 54-55). The Commission, however, recognized that to classify WABC a Class I-B station and at the same time comply with the mandate of the court to give equal treatment to WABC, WCBS, and WNBC would require WCBS and WNBC to be operated as Class I-B stations as well. This would constitute a substantial departure from the conclusions reached in the 1961 clear channel report and order regarding the best method of providing radio service to the public, would involve a loss in existing nighttime service to the public as a whole, would add "further expense, delay and uncertainty," and would not be worth the benefit to the Southwest (Pet. App. 91, 99-100).* Therefore, in conformity with other clear channel "breakdowns," the Commission decided to leave WABC as a Class I-A station and make KOB a Class II-A station (Pet. App. 109).

On appeal, the court below affirmed without an opinion, issuing a judgment in which it announced its "general agreement with the reasons" stated by the Commission (Pet. App. 114-115).

ARGUMENT

The court of appeals' judgment and the Commission's orders which it summarily affirmed are correct and reasonable, do not conflict with other judicial decisions, and do not present an issue of general importance warranting review by this Court.

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*In its order (Pet. App. 82-83), the Commission noted its pending Docket 20642 which is entertaining, among other things, various proposals for further breakdowns of Class I-A channels. Notice of Inquiry and Proposed Rulemaking, 40 Fed. Reg. 58467. Petitioner has filed comments therein advocating its views on dual Class I-B assignments.

1. The Commission's decision is a rational response to the court of appeals' 1965 decision which in effect directed the Commission to treat WABC the same as WCBS and WNBC. The Commission believed that ruling erroneous and sought review in this Court, but the Court declined to hear the case. Thus, the Commission regards the issue of equality of facilities of WABC, WCBS, and WNBC as settled, and the only question presented is whether, given the 1965 court decision, the Commission acted lawfully in the most recent proceeding.

The Commission, in re-examining the KOB/WABC matter after the 1965 remand, recognized that to achieve the result sought by Hubbard and at the same time comply with the 1965 court decision would require a drastic revision of the regulatory framework it had developed after a sixteen year proceeding in its 1961 clear channel rulemaking decision. Therefore, the proceeding was changed from an adjudicatory proceeding between KOB and WABC to a rulemaking proceeding to examine the larger issue of whether the public interest would benefit from a major change in the clear channel rules.[4]

The rules promulgated in the 1961 clear channel decision retained Class I-A stations in their existing status in order to provide the greatest possible nighttime radio service to the United States.[5] Although the Commission in that proceeding considered "breaking down" these clear

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[4]Memorandum Opinion and Order, 4 F.C.C. 2d 606 (1966). The matter was transferred to Docket No. 6741, and that docket, the clear channel proceeding, reopened. Hubbard and ABC had both indicated a preference for this procedure.

[5]Class II-A stations were authorized on some Class I-A channels. *Supra*, n. 2.

channels to permit several Class I-B stations on each channel, it concluded that this would cause serious losses in radio service which can be provided only by Class I-A stations. 31 F.C.C. 565, 574. Indeed, the Commission considered and rejected the course of reducing all three New York network flagship stations to I-B status (see note 3, *supra*).

The Commission in the order under review did take another look at the question of reducing WABC, WCBS and WNBC to I-B stations (Pet. App. 99). After examining the question, however, it found, as it had in 1961, that the cost of such action in terms of loss of service nationwide was simply too high (Pet. App. 100).

As the Report and Order demonstrates, the Commission carefully evaluated the viable alternatives and selected what in its reasoned judgment was the best solution to provide the nation with the most efficient distribution of radio service.[6] The decision required resolution of technical questions and broad policy issues involving a difficult balancing of interests, matters delegated to the reasoned discretion and expert judgment of the Commission by Congress. *Federal Communications Commission* v. *WOKO, Inc.*, 329 U.S. 223; *United States* v. *Detroit & Cleveland Navigation Co.*, 326 U.S. 236. The result, reached after careful analysis, cannot, we submit, be characterized as an abuse of discretion. The Commission's decision is reasoned and its basis articulated.

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[6]Although the Commission considered four alternatives which would provide equal facilities to WABC, WCBS, and WNBC, only two, making KOB a Class II-A station and breaking down WABC, WCBS, and WNBC to Class I-B, were technically feasible. The alternatives were: (1) assigning KOB to 1030 KHz, (2) assigning KOB to a clear channel other than 770 KHz or 1030 KHz, (3) breaking down WABC, WCBS, and WNBC to Class I-B stations, and (4) intermixing Class I-A and I-B facilities on 770 KHz (Pet. App. 98-100).

2. Hubbard's assertion (Pet. 15) that the Commission's order conflicts with this Court's opinion in *Federal Communications Commission* v. *Allentown Broadcasting Corp.*, 349 U.S. 361, is unsound. In *Allentown*, an adjudicatory proceeding involving mutually exclusive applicants for an AM broadcast license in separate cities, the Court held that the Commission had acted within its discretion under Section 307(b) of the Act in awarding the license to the applicant who would bring competitive service to the smaller community. Since the case is based on the permissibility of the Commission's choice of policy under Section 307(b), there is no conflict with the decision below, which represents another policy choice, and one hedged by court order.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1978.

DOJ-1978-03